Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

H. LLOYD WESTON,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in affirming the District Court's grant of summary judgment, thereby limiting Petitioner's claim under the Warsaw Convention and pre-empting Petitioner's state law claim by finding that there was no evidence that raised an inference that Respondent Federal Express's actions constituted willful misconduct or reckless behavior.

2. Whether the Petitioner had an affirmative duty to plead reliance on false assurances from Respondent Federal Express Corporation in order to prevail on a claim of willful misconduct exception under Article 25 of the Warsaw Convention.

3. Whether under the Warsaw Convention, Petitioner had a duty to ameliorate the damages and whether failure to ameliorate excuses willful misconduct.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion granting Respondent's summary judgment motion (Appendix ("Pet. App." 1a-5a) is not otherwise published. The court of appeals' order (Pet. App. 6a-11a) affirming the district court's grant of summary judgment is also not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its summary order on March 22, 2002. Petitioner's invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provisions of the Warsaw Convention, 49 U.S.C. § 1502, relevant to this petition are reprinted in the Appendix at 12a-14a.

STATEMENT OF THE CASE

Petitioner is a professional artist who contracted with Respondent Federal Express to ship paintings to an art exhibition. Petitioner brought an action against Respondent for failure to deliver paintings from the United States to an important art exhibition in Rome, Italy in time for display, thus causing substantial economic loss. Petitioner maintains that Respondent knew of the urgency of the delivery and informed Petitioner that Federal Express was aware of the

situation and that the paintings would be delivered on time. Respondent admits it knew of the urgency of the delivery. Petitioner also maintains that Respondent received the paintings at the terminal in Milan, Italy and is guilty of willful misconduct in the handling of the shipment in Milan. Such misconduct is an exception to the recovery limitation provision of the Warsaw Convention.

Respondent admits receiving the paintings, but denies the assurances given to Petitioner, maintaining that it was impossible to make the delivery on time due to the inspection schedule of the Italian Authorities. Respondent maintains that its liability is limited by the provisions of the Warsaw Convention.

Therefore, the issue arises as to whether or not the paintings left the airport terminal, thereby removing the case from the jurisdiction of the Warsaw Convention. Additionally, there is an issue as to whether or not Respondent was guilty of willful misconduct if:

(a) The paintings were lost, recklessly, within the terminal;

(b) Respondent ignored the urgency of delivery, either willfully or recklessly; or

(c) Whether lost or ignored, Respondent knew or should have known the urgency of delivery and its inability to deliver on time, willfully or recklessly giving false assurances to Petitioner.

Any of the above instances would satisfy the exception to limitation of liability *within* the Warsaw Convention.

The Respondent made a Motion for Summary Judgment arguing that the Warsaw Convention controlled and that Petitioner was limited to $4,652.91 in recovery. The Petitioner maintained that material issues of fact existed to warrant a jury trial on two issues:

(a) Whether the Warsaw Convention applied at all since the paintings could have been lost outside the Italian airport (if so, the Convention would not apply); and

(b) Whether the Respondent was guilty of reckless misconduct or willful misconduct (an exception within the Convention)

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, there is a substantial question of fact regarding whether or not Federal Express, whether intentionally or recklessly, misled Petitioner as to Federal Express's ability to delivery the paintings in question within the necessary time constraints made known to Respondent. Summary judgment should only be granted when there is no genuine issue as to any material fact. *See* Fed. R. Civ. Pro. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Here there are several material questions of fact and a grant of summary judgment was inappropriate in this particular case. In addition, the Court of Appeals for the Second Circuit seems to suggest that Petitioner had a duty to claim reliance on Respondent's assurances. Petitioner asserts that he did not have to rely on the assurances in order to prevail and that simply willful misconduct is enough to remove this particular case from the jurisdiction of the Warsaw Convention.

Second, the Second Circuit's decision to affirm the Respondent's motion for summary judgment conflicts with established case law. The case law supports the proposition that if Federal Express is guilty of willful misconduct, the limitation of liability in the Warsaw Convention does not apply.

I. Petitioner's Claim Under the Warsaw Convention

The Warsaw Convention is a treaty of the United States involving Italy and covers damages arising out of the "international transportation of persons, baggage or goods performed by aircraft for hire." 49 U.S.C. § 1502.

Chapter Three of the treaty contains Articles 17 through 30 concerning the liability of the carrier. Article 22 provides for limitations of liability. In particular, Article 22(2) provides as follows:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery

Article 25 of the Warsaw Convention provides:

> 1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability if the damages caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

> 2. Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damages caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Thus the limitation of liability clause does not apply to the conduct of the carrier that is willfully or grossly negligent. *See Saba v. Compagnie Nationale Air France*, 78 F.3d 664 (D.C. Cir. 1996); *Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.*, 976 F.2d 90 (2d Cir. 1992); *St. Paul Ins. Co. of Illinois v. Venezuelan Intern. Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987); *Johnson v. American Airlines, Inc.*, 834 F.2d 721 (9th Cir. 1987); *Tokio Marine & Fire Ins. Co. Ltd. v. United Air Lines, Inc.*, 933 F. Supp. 1527 (D. Cal. 1996); *Ewig Intern. Marine Corp. v. American Airlines, Inc.*, 914 F. Supp. 1543 (N.D. Ill. 1995); *Carriage Bags, Ltd. v. Aerolinas Argentinas*, 521 F. Supp. 1363 (D. Colo. 1981); *Korean Air Lines Co., Ltd. v. State*, 779 P.2d 333 (Alaska 1989). Article 25, therefore, provides for an exception to the limits of liability provided for in Article 22.

II. The Second Circuit Erred in Affirming Summary Judgment for Respondent Since a Finding of Willful Misconduct is a Question of Fact and Requires a Determination by the Trier of Fact

Determination of whether or not anyone is guilty of willful misconduct within the meaning of Article 25 of the Warsaw Convention is a question of fact, to be decided by the trier of fact. Hence, the appropriate procedure would be to permit evidence to be presented to a jury, instruct the jury as to what constitutes willful misconduct, and allow the jury to make a separate determination, by separate verdict, as to

whether or not there has been willful misconduct on the part of the carrier or any agency of the carrier, acting within the scope of employment. *See In Re: Pago Pago Air Crash of January 30, 1974*, 419 F. Supp. 1158 (C.D. Cal. 1976).

When one reads the depositions together with their attachments, there is no question that the jury should determine whether or not Federal Express was guilty of willful misconduct. First, there is the issue of whether or not the paintings were indeed lost. The affidavit of petitioner's agent contains allegations that the paintings were received by Federal Express and that on October 8, 1996 Federal Express contacted the gallery stating that the paintings had arrived. This is consistent with the testimony of Federal Express employees concerning the fax notations in the documents and Federal Express's standard operating procedure. The Warsaw Convention requires that this contact be made with the shipping customer in Article 13. It is also alleged that on several occasions, Petitioner's agent was assured that the paintings would be delivered in enough time for the October 14, 1996 exhibition. This did not occur.

More importantly, a substantial question of fact also exists as to whether Federal Express personnel intentionally misled the customer as to Federal Express's ability to deliver the paintings in a timely manner. Evidence of the testimony of a Federal Express employee regarding the fact that he was aware of the urgency of the shipment, which was communicated to him by the customer service personnel, but that he could not recollect that he knew the exact date that the shipment had to be delivered, should be presented to the jury. The credibility of that statement, taken in conjunction with the fact that the Federal Express employee

called the gallery concerning the delivery of the paintings is a fact to be determined by a jury, and not an issue that can be decided on summary judgment.

Moreover, it is also a question of fact for a jury as to whether Federal Express intentionally gave false information concerning the ability to deliver. If the goods were not lost, it is a question of fact as to whether or not the shipment was mishandled. Regardless of whether the shipment was lost or ignored, if the allegations are true, then Federal Express is guilty of willful misconduct. In *In Re Pago Pago Aircrash of January 30, 1974*, 419 F. Supp. 1158 (C.D. Cal. 1976), the court recognized that

> there is an insurmountable threshold question of fact to be determined by the trier of the fact, i.e., the jury, or the Court if a jury is waived, as to whether or not there was "*wilful misconduct*" on the part of the defendant as one of the proximate causes of said crash which would exclude the carrier, from taking advantage of the limitations of liability of the Warsaw Convention.

Id. at 1160. Moreover, "there can be no doubt that *the determination of whether or not any one is guilty of 'willful misconduct' is a fact question and can only be decided by the trier of fact.*" *Id.* (emphasis added).

In considering a motion for summary judgment, the court should consider the evidence in the light most favorable to the plaintiff and should only grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law". *Celotex* at 322. Here Petitioner has not failed to make a sufficient showing on any essential element of the case.

In addition, the Second Circuit has suggested that Petitioner had an affirmative duty to plead reliance on false assurances by FedEx of on-time delivery in order to prevail under the Warsaw Convention. However, Petitioner filed this case in state court, only to have it later removed by Respondent to federal court. The state court action was not initiated under the Warsaw Convention, but rather the Answer filed by Respondents raised the application of the Warsaw Convention as an affirmative defense. Therefore, Petitioner had neither the opportunity to plead based on the Warsaw Convention, nor did Petitioner seek redress under the Warsaw Convention. Therefore, the Second Circuit erred in placing the burden on Petitioner to plead reliance in order to prevail.

III. Certiorari is Warranted Because the Decision Below Conflicts with Prior Decisions of the Second Circuit and with Decisions From Other Circuits

The Second Circuit's holding which affirms the District Court grant of summary judgment conflicts with settled law in this area. Well established case law supports the proposition that if a company is guilty of willful misconduct, then the limitation of liability does not apply. *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller*, 292 F.2d 775 (D.C. App. 1961) sets forth the definition of willful misconduct under the Warsaw Convention as "the intentional performance of an act with knowledge that the act will probably result in injury or in some manner as to imply reckless disregard of the consequences of its performance; and likewise, it also means failure to act' in

such circumstances." *Id.* at 778. Here it is alleged that Federal Express knew of the urgency of the matter and continued to assure the customer that the goods would arrive on time for the exhibition. *See also, Ulen v. American Airlines, Inc.*, 186 F.2d (D.D.C. 1949); *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965).

In *In Re: Pago Pago Aircrash of January 30, 1974*, 419 F. Supp. 1158 (C.D. Cal. 1976), the court held that "if there was willful misconduct on the part of the carrier or any agent acting within the scope of his employment, the carrier is precluded from limiting his liability to the amount set forth in the Warsaw Convention." *Id.* at 1160. *See also, El al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138 (2d Cir. 1998); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978). *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965). These cases reinforce the concept that the Warsaw Convention shall not be preempted upon a finding of willful misconduct on the part of the carrier. Article 25 of the Warsaw Convention explicitly states that a carrier shall not be entitled to avail itself of the provisions of the Convention that limit liability if its misconduct is willful. *El al Israel Airlines* at 676.

Specifically, in *Onyeanusi v. Pan Am*, 952 F.2d 788 (3d Cir. 1992), the Third Circuit, citing Warsaw Convention Article 25(1), held that if an international carrier was guilty of any intentional misconduct, such misconduct would permit the plaintiff to recover damages in excess of the Warsaw Convention's limitations on monetary liability (intentional misconduct was not found in that case). *Id.* at 794. Thus, the Third Circuit has reached an entirely different conclusion on the same issue, meriting review and reversal by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MARCH 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of March, Two Thousand Two.

PRESENT: HONORABLE FRED I. PARKER
HONORABLE ROSEMARY S. POOLER
HONORABLE BARRINGTON D. PARKER, JR.
Circuit Judges.

No. 01-7472

Appendix A

H. LLOYD WESTON,

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellee.

* * *

Appeal from the United States District Court for the District of Connecticut (Warren W. Eginton, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant H. Lloyd Weston ("Weston") appeals from the judgment of the district court entered March 2, 2001 granting the motion for partial summary judgment of defendant-appellee Federal Express Corporation ("FedEx"), limiting FedEx's liability in accordance with Article 22 of the Warsaw Convention (the "Convention").

It is undisputed that Weston contracted with FedEx to ship artwork from Danbury, Connecticut on October 2, 1996 to arrive in Rome, Italy, where the artwork was to be displayed in an art exhibition on October 14, 1996. The artwork arrived at Malpensa Airport in Milan, Italy on October 5, 1996. The artwork could not clear customs and be shipped to Rome,

its final destination, until after the Italian Art Ministry ("BRERA") inspected it. At the time, BRERA only conducted inspections at Malpensa Airport on the first and third Wednesday of the month — October 2 and October 16 of the month in question. The artwork was inspected on October 16, 1996, but plaintiff refused delivery in Rome on the ground that the artwork was too late for its intended exhibition.

Taking Weston's allegations as true, his agents repeatedly telephoned FedEx after the paintings had arrived in Milan and were falsely informed that "things were being properly handled" and the artwork would arrive in Rome in time for the exhibition. Also, plaintiff's agent Prince George of Serbia avers that: (1) on October 11, 1996, a FedEx representative told Prince George that the artwork had already been shipped to Rome, and (2) on October 14, 1996, Ms. Sabina of FedEx told Prince George that FedEx was unable to locate the artwork.

Weston argues on appeal that partial summary judgment should not have been granted because there are disputed, material questions regarding (1) whether FedEx acted with willful misconduct under Article 25 of the Convention, thereby fitting within an exception to the liability limitation of Article 22, and (2) whether the artwork was temporarily lost outside of the grounds of the Malpensa Airport, therefore taking this dispute outside of the Warsaw Convention because Article 18 does not apply to damage or loss that occurs outside of airport grounds.

We find plaintiff's claims are without merit. Article 25 would only render the Convention's liability limitation inapplicable if the defendant's willful misconduct caused plaintiff's injury. Regardless of whether FedEx's allegedly false and misleading statements constitute willful misconduct, Weston's injury or damage was not "caused by [FedEx's alleged] willful misconduct." Article 25(1). Plaintiff was injured because his artwork did not arrive in Rome in time for the planned exhibition, an injury that was inevitable once the artwork shipped from Connecticut on October 2, 1996. The delay of the artwork was not caused by FedEx's alleged misrepresentations. Weston did not allege that he relied on false assurances by FedEx of delivery in time for the exhibition when deciding to ship the artwork via FedEx on October 2, 1996, willful misconduct that would have resulted in the injurious delay. Nor does Weston allege that he could have done anything to ameliorate the delay had he been informed of its inevitability once the artwork had arrived in Milan. Accordingly, the willful misconduct exception of Article 25 does not apply.

Weston's next argument also fails, even assuming that his artwork was temporarily lost off airport grounds (a proposition for which he provides scant evidence), because the argument is predicated on the applicability of the inapplicable Article 18. Article 18 provides that carriers are liable for "damage sustained in the event of the *destruction or loss of, or of damage to*, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place *during the transportation by air*." Article 18(1) (emphasis added). Thus, hypothetically, if Weston's paintings had been permanently lost after being placed in FedEx's

warehouse facility outside of airport grounds, FedEx's liability would not be governed by the Warsaw Convention. *See Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705 (2d Cir. 1990). Yet Weston does not claim damages for "destruction or loss of, or of damage to" his paintings within the meaning of Article 18. Instead, Weston seeks damages for the delay of his paintings within the meaning of Article 19, which provides that a "carrier shall be liable for damages occasioned by *delay* in the transportation by air of passengers, baggage, or goods." Article 19 (emphasis added). Since Article 19 applies, the limitation of liability provision also applies. The Article 18 definition of "transportation by air" on which Weston predicates his argument only applies to Article 18. Therefore, even if we were to stretch Weston's proffered facts beyond reasonable inference to conclude that the paintings may have been temporarily lost off airport grounds, this conclusion bears no impact on the applicability of the Warsaw Convention to his claim.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr
Lucille Carr, Operations Manager

APPENDIX B — RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED MARCH 2, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:97cv1285(WWE)

H. LLOYD WESTON

v.

FEDERAL EXPRESS CORP.

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, H. Lloyd Weston, alleges that the defendant, Federal Express Corporation ("FedEx"), failed to deliver a shipment of his paintings on time, and therefore is liable for breach of contract and negligence.

Defendant has filed for partial summary judgment. Specifically, defendant argues that its liability is limited in accordance with the Warsaw Convention. For the following reasons, the motion for partial summary judgment as to the limitation of liability will be granted.

Appendix B

Background

Plaintiff and defendant have both submitted statements of facts in compliance with Local Rule 9(c) and rely upon evidentiary materials, including exhibits and affidavits. These submissions and the pleadings reveal the following undisputed facts.

Plaintiff H. Lloyd Weston, a Ridgefield resident, is a professional artist whose work includes sculptures and paintings. He was engaged to have his artwork exhibited in a one-man art show in Rome, Italy, on October 14, 1996.

Plaintiff and his agents arranged to ship the artwork to Rome via FedEx through a Pak Mail Center.

On October 3, 1996, Pak Mail and FedEx entered into a contract of carriage whereby FedEx agreed to ship plaintiff's paintings. The shipment comprised four pieces weighing 513 pounds.

The shipper declared that the shipment of artwork had a value of $500 for customs and was liable only to pay duties on $500. The contract of carriage was embodied in the FedEx air waybill under which the shipment traveled.

The shipment arrived in Italy at the Malpensa Airport on October 5, 1996. On October 11, 1996, a request was sent to the Italian Customs Office of Malpensa requesting authorization to import the shipment. That day, Italian Customs, which generally refers such inspections to the Italian Art Ministry ("BRERA"), requested that BRERA make an inspection of the shipment.

Appendix B

In 1996, BRERA conducted inspections at the Malpensa Airport only the first and third Wednesday of each month. In October, 1996, the first and third Wednesday of the month fell on October 2, 1996, and October 16, 1996.

On October 17, 1996, FedEx received confirmation on behalf of BRERA that the requested inspection had been conducted. The shipment was later refused and sent back to the United States.

This litigation ensued.

Discussion

A. *Standard of Review*

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F. 2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson*, 477 U.S at 249.

FedEx argues that plaintiff's claims against it are governed by the provisions of the Warsaw Convention, which is a treaty that governs claims for damages arising out of the international transportation of goods by aircraft.

Where, as in the instant case, the air waybill provides for transportation by air between certain designated terminals, the provisions of the Warsaw Convention apply. *See Benjamins v. British European Airways*, 572 F. 2d 913, 914 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

Article 22(2) of the Convention states:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value to the consignor at delivery.

Appendix B

As plaintiff points out, a carrier is not entitled to avail itself of the Convention's limitation on liability in the event that the carrier has acted with willful misconduct or gross negligence. Article 25, Warsaw Convention.

Proof of willful misconduct requires a showing that the carrier, or its servants or agents, acted with intent to cause damage, or acted recklessly with knowledge that damage would probably result. *Piamba Cortes v. American Airlines*, 177 F. 3d 1272, 1290 (11th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000).

After review of the evidence, the Court finds no evidence that raises an inference that FedEx's actions constitute willful misconduct.

Plaintiff argues further that summary judgment is not appropriate because a question of fact exists as to whether or not the goods left the terminal after their arrival, in which case the Warsaw Convention would not apply. However, the evidence in the record demonstrates that the shipment remained in the custody of FedEx at Malpensa Airport during the relevant period of time.

Accordingly, the Warsaw Convention is the exclusive remedy in this case. *El al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999)(Warsaw Convention creates the exclusive remedy in cases involving the international transportation of goods). Plaintiff's state law claims are preempted, and his damages are limited to the amount of 250 francs per kilogram.

Appendix B

Conclusion

For the foregoing reasons, defendant's Motion for Partial Summary Judgment as to the limitation of liability [doc. # 34] is GRANTED. Defendant's liability is limited in accordance with Article 22 of the Warsaw Convention.

Within 14 days of this ruling's filing date, the parties are instructed to file a stipulation as to the amount owed pursuant to Article 22(2) of the Warsaw Convention for this Court's approval.

SO ORDERED.

s/ Warren W. Eginton
Warren W. Eginton
Senior United States District Judge

Dated the 2nd day of March, 2001 in Bridgeport, Connecticut.

APPENDIX C — RELEVANT PROVISIONS OF CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR ("WARSAW CONVENTION")

Concluded At Warsaw October 12, 1929. And Entered Into Force For The United States October 29, 1934, Subject To A Reservation.

* * *

CHAPTER I - SCOPE - DEFINITIONS

ARTICLE 1

(1) This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

* * *

ARTICLE 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due on and complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

* * *

ARTICLE 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

* * *

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

* * *

Supreme Court, U.S.
FILED

AUG 20 2002

OFFICE OF THE CLERK

No. 01-1866

IN THE

Supreme Court of the United States

H. LLOYD WESTON,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Federal Express Corporation, is a wholly owned subsidiary of FedEx Corporation. The stock of FedEx Corporation is publicly traded on the New York Stock Exchange.

STATEMENT OF THE CASE

This is a simple breach of contract action. Petitioner, H. Lloyd Weston, ("Weston") asserts that Respondent, Federal Express Corporation ("FedEx") breached its shipping contract when there was a delay in the delivery of an international shipment from the United States to Rome, Italy containing paintings and painting frames for an art exhibition. Weston seeks recovery under theories of negligence and breach of contract.

FedEx asserts, and the lower courts agreed, that the Warsaw Convention, an international treaty governing the international transportation of goods, governs all claims associated with the shipment at issue. Weston alleges that FedEx committed "willful misconduct" and that the limitations of the Warsaw Convention, therefore, should not apply to this shipment. Weston has failed to produce any evidence of willful misconduct by FedEx. Furthermore, Weston puts forth a hypothesis that the Warsaw Convention *may* not govern the shipment at issue since the loss *may* have occurred off airport property. Plaintiff has offered absolutely no evidence or testimony that the shipment at issue moved off airport property. Because Weston failed to bring forth any evidence that created a genuine issue of material fact, the lower courts were correct in their holdings.

FedEx moved the district court for summary judgment on the grounds that Weston is barred from recovery by the terms and conditions of the Warsaw Convention or in the alternative, Weston's recovery is limited to $4,652.91 pursuant to the Convention. The district court found for the FedEx and limited Petitioner's recovery to $4,652.91. The Second Circuit, on de novo review, upheld that determination. It is that finding from which Petitioner seeks grant of this Writ.

Because the decision of the court of appeals was consistent with the prior rulings of this Court and numerous other federal courts, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I. There is No Compelling Reason to Grant Writ.

The petitioner urges this Court to review the ruling of the court of appeals because both the court of appeals and the district court improperly granted FedEx's motion for summary judgment. As Weston has stated, Summary Judgment should only be granted when there is no genuine issue as to any material fact. *See* Fed. R. Civ. Pro. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). FedEx agrees. The lower courts also agreed that the cited standard is the one to be applied. It would appear Weston's real argument is that the courts below misapplied that standard.

This Court has laid out numerous factors that determine whether review on a writ of certiorari is appropriate. Although the relevant rule states that the factors are illustrative only, the rule does require a compelling reason for review in the absence of the listed factors. *See* Sup. Ct. R. 10. In this matter, there is simply no compelling reason for grant of the writ and certainly no conflicting decisions for this Court to resolve. Weston simply wants one more chance to persuade a court that a genuine issue of material fact exists.

Weston has alleged no conflict between any of the United States courts of appeals. He has further alleged no conflict between any holdings of the appellate courts and any state court of last resort. He has alleged no extraordinary departure by the court of appeals, which would require this Court's intervention. In short, he has presented no reason for further review. *See* Sup. Ct. R. 10.

The Supreme Court Rules also state that a writ is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10. Weston's argument is, at best, a claim that the district court and court of appeals misapplied the summary judgment standard. Although FedEx disagrees that the court of appeals erred, their allegation of "misapplication of the law" is simply insufficient to warrant further review.

II. The Court of Appeals Ruled Correctly.

It is undisputed that in the absence of "willful misconduct" on the part of FedEx, the Warsaw Convention limits the carrier's liability based upon either the declared value of the shipment or, in the absence of a declared value, the weight of the shipment. Since there was no value declared for carriage, the court limited FedEx's liability to 250 francs per kilogram ($4,652.91).

The district court, in its order, properly cited a standard of willful misconduct as requiring "a showing that the carrier, or its servants or agents, acted with intent to cause damage, or acted recklessly with knowledge that damage would probably result." *Piamba Cortes v. American Airlines*, 177 F.3d 1272, 1290 (11th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000). Summary judgment was appropriate because Weston had the burden in both of the lower courts to "make a sufficient showing" of willful misconduct. *Celotex Corp.*, 477 U.S. at 323. This he did not do.

The district court made a specific finding that "after review of the evidence, the Court finds no evidence that raises an inference that FedEx's actions constitute willful misconduct." The court of appeals stopped short of the question of whether the alleged misstatements constituted willful misconduct. The court of appeals found that FedEx's

alleged misleading statements did not "cause" his damages. The Court of Appeals properly cited the convention's requirement that the damage must be "caused by [FedEx's alleged] willful misconduct." Article 25(1). The court found that the delivery could not have been made on time because Italian customs had not yet inspected the shipment. Late inspection, not misleading statements, was the cause of Weston's damage.

CONCLUSION

The decision of the Court of Appeals is consistent with federal law enforcing the limitations of liability as set forth in international treaties. Weston's entire argument is that the Court of Appeals improperly applied properly stated law. There is no compelling reason for grant of Weston's petition. The petition for writ of certiorari should be denied.

Respectfully submitted,

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